United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

74-2639

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

MARTIN FRANK,

Defendant-Appellant.

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC, AND MOTION IN THE ALTERNATIVE FOR STAY OF MANDATE PENDING CERTIORARI

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PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC, AND MOTION IN THE ALTERNATIVE FOR STAY OF MANDATE PENDING CERTIORARI.

To the Honorable Circuit Judges Smith and Oakes and District Judge Jameson:

The petitioner, Martin Frank, respectfully prays that this panel of the Court will grant him a rehearing and reconsideration on its decision and opinion of June 27, 1975 wherein it affirmed the judgment of the United States District Court, Southern District of New York, which had convicted petitioner, Martin Frank, of conspiracy to violate the federal security laws, 18 U.S.C. § 371, after trial before Tyler, D.J. and a jury.

In the event that this panel rejects this petition, or grants it, but adheres to its present determination, then petitioner respectfully requests that this petition be circulated

among all active circuit judges for their consideration en banc.

A-Factual background: The opinion of the Court and the briefs of counsel set forth the facts. The Court will recall, however, that the thrust of the prosecution was based initially upon an alleged manipulation scheme involving a stock, Training with the Pros (TWP). The case was given to the jury on the premise of undisclosed underwriters.

B-Reasons for granting a rehearing: We submit that this panel erred in its interpretation of certain of the facts and in some of the legal conclusions to which it came.

1- This Tribunal found no error in the categorical ruling of Judge Tyler that all of the witness and co-defendant Allen's testimony, consisting of almost 600 pages of the record, should be stricken so far as favorable to Frank. No guide or instruction was given to the veniremen and to what this meant, and no explanation was made, other than that it was for "technical reasons".

This Court justified this incredible ruling by the trial judge, saying, inter alia, that this was necessary to "protect the court itself against fraud". It went on to opine that (slip 4445):

> "The only viable alternative for the court was to permit cross-examination by the Government on the basis of the theretofore inadmissible tapes."

In addition, this Court, incorrectly assumed that Frank had admitted receiving $15,000.00 (slip 4444).

This is not accurate at all, since in context, Frank did not unequivocally admit getting $15,000, and even the Government dropped the position that $15,000 was ever paid to Frank!

In other words, Allen's testimony that Frank never received $15,000 was not at all inconsistent with the tape, and the Government ultimately dropped its contention that he ever received that money.

This panel completely over-looked the fact that Paragraph 5(r) of the first Count of the Indictment relating to Frank's receiving $15,000 was dismissed by the Government. In the tape, Frank relates that he never did get the $15,000, as the context of the tape reveals.

There was no "perjury" per se being committed by Allen, since the tape was conjured up from a post-indictment idea of the prosecution to obtain incriminating evidence against Frank. Judge Tyler rejected the Government's argument that the tape was to investigate a different crime.

This Court apparently over-looked another part of the transcript of the suppressed tape. On page eight of the tape, Frank declares:

> "Yea, but they're telling you that, that $15,000 was in connection with the payoff in Training and that's the lie. That's the lie, Jerry."

The Court may also recall that the Swiss account of Frank had the code name "Lance" (tr. 14). At page 22 of the tape, Allen refers to an alleged transfer of $15,000 from "Erica" to "Lance". But Frank states, "I never deposited one penny to Lance, and its the truth."

How is it, therefore, possible that this Court then assumes that Allen would be "perjuring" himself to state that no money was ever paid to Allen, and certainly not $15,000!

A grave injustice has been perpetrated by the Court's incorrect assumptions. Add to this the Government's sua sponte dismissal of Count 1, para. 5(r) relating to the $15,000 and we see how Allen's testimony is fortified.

We ask this Court to bear in mind that Allen's later plea of guilty did not relate to his exculpatory testimony about Frank, but rather to the alleged subbornation of Allen by the Government.

We believe that this Court has an obligation to review this error in the light of the actual facts and actual tape.

2- In addition, this panel's opinion does not make clear that it was aware of the fact that Allen's testimony concerned many matters completely unrelated to the alleged $15,000. (See

Applt. Br. 32-36).

We maintain that there is no justification for having stricken all of Allen testimony. Moreover, the Court did not similarly strike the impeaching cross-examination of Allen.

While the Court is aware of the fact that Allen waived his Fifth Amendment privilege by testifying on direct, it does not broach the question as to why the trial judge did not invoke his contempt powers to compel testimony.

We are aware that this Court was concerned about prejudice to Stoller, the co-defendant on trial with Frank, but the Court over-looks completely that the Government had no right whatsoever to bring up the question of the $15,000 since it had not been covered on direct. We ask the Court to perceive that nothing about an alleged "payoff" to Frank was elicited on direct.

Since the Government itself had dismissed the charge concerning the $15,000, how can this Court even suggest that it was pertinent? We submit that it was clearly collateral and improper cross despite this Court's statement in footnote 8 at slip 4445.

3- The manner in which the trial judge struck the entire testimony of Frank could lead the talismen to no conclusion other than that Frank was guilty since the judge told them to

ignore anything exculpatory of Frank in Allen's testimony. That left the inculpatory.

4- Since the Government had improperly procured the tape in the first place, they were certainly reaping a benefit from their own wrongdoing. It is deterrence of official wrongdoing that is at the core of the exclusionary rules and yet this Court condones the lawless conduct of any law enforcement agency since this decision will no doubt be interpreted as indicating that the Government may seek to impeach their own informer by the product of his illegal activity at their behest. Lee v. Florida, 392 U.S. 378 condemns the use of improperly obtained wiretaps and the same reasoning should impel a similar conclusion herein.

In Brown v. Illinois, -U.S.-, decided June 26, 1975, the Supreme Court indicates that there is an interplay between the Fourth and Fifth Amendments and that great caution should be exercised before a statement of a defendant is used. How much more is that the case than herein where Frank did not take the stand, and the questioning was of a witness who was called by a co-defendant.

The questioning about the tape concerning the $15,000 had nothing to do with the direct examination and in any event, no one, including the Government, sought to prove that Frank

ever received that sum. Indeed, the Government withdrew that allegation from the charge.

5- In another portion of its opinion, this Court states that there was no Brady or Jencks Act material in the D'Onofrio sentencing memoranda given to Judge Brieant by the Government which was not already disclosed to appellant (Slip 4446).

This is incomprehensible since the Court has never permitted appellant to see that memoranda! The prosecutorial eye and even the judicial eye may be out of focus when it comes to matters helpful to an accused (Alderman v. United States, 394 U.S. 165).

If the memoranda given to Judge Brieant contained no matter not already delivered to appellant, why in the world was it kept from appellant? Why does this Court still keep it from the appellant? We submit that if this Court is correct, then the memoranda should have been turned over in the Court below and should be made available now, otherwise, the vehement efforts to keep it from Frank are inexplicable.

When the Government handed this memoranda to the Court at oral argument at appellant's insistence, the trial and appellate prosecutor admitted that it contained Brady material, but said it did not contain matter not already divulged. We maintain that the Government's actions do not conform to this

statement. If this were the case, then Frank is entitled to this material to make his own determination of that allegation. This Court is in essence now saying that Brady material may be withheld by the mere assertion that it has been turned over in another form, but without verification by the defendant.

The danger and folly of that assurance is seen from the possibility that a defendant may be given ten files full of material containing thousands of documents. If there is a single memorandum that would point out the Brady material, perhaps be the difference between guilt and innocence, may the Government withhold that memorandum on the grounds that somewhere in the myriad of material turned over, the same information could be winnowed out?

We contend that this would be a perfidious and deceitful approach and would make a mockery of the Jencks Act and Brady v. Maryland, 373 U.S. 83.

If counsel cited a case as being included in the reports of the Supreme Court, but giving no volume and page citation, perhaps counsel would be accurate, but it would be of no help to the Court or opposing lawyers!

We ask that the Court turn over the memoranda which were given to Judge Brieant concerning the crucial witness D'Onofrio. We maintain that in light of the fact that this Court and the

Government claim that it contains no secrets, that a failure to do so can only cast doubts on the fairness of the judicial process.

6- The Court states that Frank was not prejudiced by the delay of almost 5 years during which time Moss, the president of TWP died. This panel notes that Frank could have deposed Moss (Fed. R. Crim. P. 15, 18 U.S.C. 3503). Unfortunately, this panel completely overlooks the fact the Moss' testimony was preserved by the hearings before the SEC on May 27, 1969 and it is undenied that there are a number of areas where Moss' testimony might have been exculpatory (see, Applt. Br. p. 42; Affidavit of Milton Gould, August 27, document #37). The Court suppressed it.

Why should appellant depose Moss when his testimony was already preserved in an SEC hearing? This the Court has not mentioned. We ask that it be reconsidered in this light.

7- The Court dismisses as without merit the contention that a severance should have been granted (slip 4447). Yet, in its opinion it has observed that the Trial Court could not permit the cross-examination of Allen because of possible prejudice to Stoller. A severance would have eliminated this possibility. In addition, if Stoller's case had been severed, Allen might never have been called as a witness at all, since

it was Stoller who put him on the stand. This would have eliminated some prejudice. On the other hand, if Frank had called Allen in a separate trial, it would have been restricted to Frank's activities and nothing else.

8- We maintain that the Massiah (v. United States, 377 U.S. 201) claim was properly preserved, but even if untimely, this Court should review it under Rule 52(b), Fed. R. Crim. P. because of the serious infringement of his rights by the government.

We maintain that the Court's statement that appellant cannot resort to "perjurious testimony and avoid impeachment however obtained" is predicated upon its mistaken reading of the tape, and its assumption that the tape proved that Frank had received $15,000. We have explained, supra, that no such contention was made by the Government, and that the tape and the facts do not support the proposition that Frank ever received $15,000 as a payoff, or that he was given such a sum at all, in reference to this case.

At slip 4444, this Court says that the evidence in chief of the Government proved, or sought to prove, that Frank had received $15,000 to tell the conspirators how to run the TWP deal. The Government did not prove this and in fact sua sponte dismissed that allegation from the indictment! Footnote 7 of

the Court (slip 4444) is out of context and inaccurate, since it does not quote from the other pages of the tape, as explained supra, where it is obvious that Frank is denying that he was paid that sum of money -- at least grossly inconsistent with the portion quoted in footnote 7. We emphasize that the Government did not establish that Frank received $15,000, and that sum as a payoff was not brought out in Allen's direct testimony. Unfortunately for the appellant, this Court has confused that aspect of the case.

We ask this Court to reconsider its determination that there is no merit to the claim that the Court shifted its theory of the case from manipulation to undisclosed underwriters. The eloquent objections made by counsel below and the thrust of the case itself reveal that the theory of the prosecution was altered to the prejudice of petitioner. We ask reconsideration of this aspect of the decision as well.

If there was ever a case for a rehearing, we maintain, most respectfully that this is the one.

MOTION IN THE ALTERNATIVE FOR STAY OF MANDATE PENDING CERTIORARI.

If the petition for rehearing is denied, or even if granted, it does not alter the decision, then we ask that the mandate be stayed pending certiorari in view of the im-

portant issues presented supra. The appellant is an attorney at law and deserves an opportunity to seek review in the Supreme Court under a stay of mandate.

RESPECTFULLY SUBMITTED,
s/ Irving Anolik
IRVING ANOLIK
Attorney for Appellant Frank

CERTIFICATION OF GOOD FAITH

This petition for rehearing is submitted in good faith and not for the purpose of delay.

July 10, 1975

s/ Irving Anolik
Irving Anolik

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- *against* -

MARTIN FRANK,

Defendant-Appellant.

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Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF New York *ss.:*

I, James Steele, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 250 West 146th, Street, New York, New York
That on the 11th *day of* July *19* 75 *at* ~~[redacted]~~ 1 St. Andrews Place, N.Y., N.Y.

deponent served the annexed Petition *upon*

Paul J. Curran, U.S. Attorney Southern District

the Attorney *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein.*

Sworn to before me, this 11th
day of July *19* 75

Robert T. Brin

James Steele
JAMES STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977